

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BARBARA A. CHALMERS and U.S. POSTAL SERVICE,  
POST OFFICE, Memphis, Tenn.

*Docket No. 97-1343; Submitted on the Record;  
Issued March 2, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment of \$6,484.63 occurred; (2) whether the Office properly found that appellant was without fault in the creation of the overpayment; (3) whether the Office properly denied appellant's request for waiver of recovery of \$6,484.63; and (4) whether the Office properly determined that the overpayment would be collected from the initial payment of appellant's schedule award for her upper extremities.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant sustained her injury on March 1, 1988, was authorized to receive compensation benefits through May 4, 1991 and received compensation periodically thereafter until January 8, 1996 when she returned to work.

In a preliminary determination dated November 20, 1996, the Office found that appellant received an overpayment of \$6,484.63 because she earned an average of \$75.36 per week from her position as a recording secretary for the National Postal Mail Handlers Union from December 2, 1990 to February 28, 1993 while she was receiving total disability compensation. The Office found that appellant was without fault in the matter of the overpayment. The Office informed appellant that she should provide information regarding her income and expenses to determine whether it would be against equity and good conscience or defeat the purpose of the Federal Employees' Compensation Act to recover the overpayment.

By decision dated January 10, 1997, the Office affirmed its preliminary determination that appellant received an overpayment of \$6,484.63 and that she was without fault in the matter of the overpayment. The Office found that waiver of the recovery was not warranted, stating that appellant did not respond to the Office's November 20, 1996 preliminary findings and did not request a conference or waiver or return the overpayment recovery questionnaire. The Office concluded that no evidence had been received showing that appellant met the criteria for waiver. The Office noted that appellant was receiving a schedule award of 37.44 weeks of

compensation payable for permanent impairment of her upper extremities and stated that the overpayment would be collected in full from the initial payment under that award.

The Board finds that appellant received an overpayment of \$6,484.63.

The Office's finding in its November 20, 1996 preliminary determination that appellant received an overpayment of \$6,484.63 is supported by an investigative memorandum dated September 21, 1994 and attached documents submitted by the employing establishment. The documents show that on Forms EN1032 and a letter dated January 20, 1994 appellant stated that she had been receiving a salary of \$180.00 a month from the union for her services as a recording secretary from June 5, 1988 until February 28, 1993 when she resigned. The Office calculated that from December 2, 1990 to February 28, 1993 appellant's earnings averaged \$75.36 a month, and that the total amount she earned was \$6,484.63. Appellant does not refute the fact of overpayment and she has not submitted any evidence to the contrary.

The Board further finds that the Office properly found that appellant was without fault in the creation of the overpayment.

Section 8129(b) of the Act<sup>1</sup> provides that an overpayment of compensation shall be recovered by the Office unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or be against equity and good conscience.<sup>2</sup> Adjustment or recovery must therefore be made when an incorrect payment has been made to an individual who is with fault.<sup>3</sup>

The implementing regulation<sup>4</sup> provides that a claimant is with fault in the creation of an overpayment when he: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.

The Office determined that appellant was without fault in the creation of the overpayment because she reported her union employment and salary on each of the Forms EN-1032 that she filed during the relevant time period and the Office took no action at the time, apparently because the reported income was less than minimum wage. The Office's determination is supported by the documents presented by the employing establishment's investigation. Appellant properly provided information about her earnings from the union at the appropriate time to the Office and therefore is without fault in the creation of the overpayment.

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<sup>1</sup> 5 U.S.C. § 8129(b).

<sup>2</sup> *Philip G. Arcadipane*, 48 ECAB \_\_\_\_\_ (Docket No. 95-1024, issued June 6, 1997); *Michael H. Wacks*, 45 ECAB 791, 795 (1994).

<sup>3</sup> *William G. Norton, Jr.*, 45 ECAB 630, 639 (1994).

<sup>4</sup> 20 C.F.R. § 10.320(b).

The Board finds that the Office did not abuse its discretion in refusing to waive the recovery of the overpayment.

The Act provides that, where an overpayment of compensation has been made, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>5</sup> The applicable regulation provides for “decreasing subsequent payments of compensation, having due regard to the probable extent of the future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual.”<sup>6</sup> The only exception to the Office’s right to adjust later payments or to recover overpaid compensation is where an overpayment has been made to an “individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”<sup>7</sup> The regulations provide that recovery of an overpayment will defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid beneficiary of income and resources needed for ordinary living expenses. Recovery is considered against equity and good conscience where a claimant has relied on the payment or notice of payments by relinquishing a valuable right or changing his or her position for the worse.<sup>8</sup>

In the present case, appellant submitted no financial evidence to establish that recovery of the overpayment would defeat the purpose of the Act and the evidence does not show that she has relied on the payments or notice of the payments by relinquishing a valuable right or changing her position for the worse.<sup>9</sup> Accordingly, the Office properly determined that appellant was not entitled to a waiver of repayment of the overpayment.<sup>10</sup> The Office therefore properly determined that the overpayment would be collected from the initial payment of appellant’s schedule award for her upper extremities.

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<sup>5</sup> 5 U.S.C. § 8128(a); *see William D. Emory*, 47 ECAB \_\_\_\_ (Docket No. 94-881, issued February 14, 1996).

<sup>6</sup> 20 C.F.R. § 10.321(a); *see Roger Seay*, 39 ECAB 441 (1988).

<sup>7</sup> 5 U.S.C. § 8129(a); *see William D. Emory*, *supra* note 5 at 7.

<sup>8</sup> 20 C.F.R. § 10.323.

<sup>9</sup> Although appellant’s attorney submitted documents purportedly requesting a hearing and supporting his objection to the overpayment and denial of a waiver, these documents were received by the Office either on January 21 or on January 31, 1997, after the Office issued its final decision on January 10, 1997, and therefore may not be considered by the Board. *See* 20 C.F.R. § 501.2(c).

<sup>10</sup> The Office’s regulations provide that in requesting waiver of an overpayment, the overpaid individual has the responsibility for providing the financial information to the Office. 20 C.F.R. § 10.324. *See Connie H. Potratz-Hasson*, 42 ECAB 359 (1991).

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 10, 1997 is affirmed.

Dated, Washington, D.C.  
March 2, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member